IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 24TH MAY 2007 / 3RD JYAISHTA 1929

SA.No. 776 of 1993(A)

AS.139/1993 of PRL.S.C.,THALASSERY
OS.123/1989 of MUNSIF COURT, KUTHUPARAMBA

PLAINTIFF /APPELLANT/ APPELLANT

*** PANGOLI KU NHAMBU, MEMANTHAN AMSOM,**
CHETTARIPARAMBA DESOM. (DIED)

ADDL.APPELLANTS 2 TO 9 IMPLEADED

2. KALATHIL THIRUVOTH RAJAN,
MAMANTHERI AMSOM,
CHETTARIPARAMBA DESOM, KANNUR DISTRICT.

3. KALATHIL THIRUVOTH MUKUNDAN OF DO. DO.

4. KALATHIL THIRUVOTH USHA OF DO. DO.

5. KALATHIL THIRUVOTH SUDHA OF DO.

6. KALATHIL THIRUVOTH VINOD OF DO. DO.

7. KALATHIL THIRUVOTH JYOTHI OF DO. DO.

8. KALATHIL THIRUVOTH SHYMA OF DO. DO.

9. KALATHIL THIRUVOTH SHAJI OF DO. DO.

ADDL. APPELLANT S R2 TO R9 ARE IMPLEADED AS PER ORDER DT.22.8.95 IN CMP. 1290/1995.

BY ADV. SRI.R.K.MURALEEDHARAN

DEFENDANTS/ RESPONDENTS/ RESPONDENTS

***1 PUTHUSSERI ACHUTHAN, KANNAVOM AMSOM,**
VATTOLI DESOM (DIED)

2. SISTER MATHU, KANNAVOM AMSOM,
VATTOLI DESOM.

S.A. NO.776/1993

ADDL. R3 TO R6 ARE IMPLEADED

3. MADHAVI, W/O.LATE ACHUTHAN,
PUTHUSSERI HOUSE, PUZHARIPPOYIL P.O.,
THOLAMBRA PIN 670 673.

4. DEVAKI D/O. -DO- -DO-

5. RADHA -DO- -DO-

6. SUSHEELA DO- -DO- CHEMMARATH HOUSE DO.

ADDL.RESPONDENTS 3 TO 6 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED 1ST RESPONDENT AS PER ORDER DT.2.2.06 IN IA.1482/2005.

BY ADV. SRI.M.P.ASOK KUMAR
SRI.K.V.SOHAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 24/ 05 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.776 OF 1993

Dated 24th May 2007

J U D G M E N T

Plaintiff in O.S.123 of 1989 on the file of Munsiff court, Kuthuparamba is the appellant. Defendants therein are the respondents. Suit was instituted for recovery of possession and permanent prohibitory injunction. Plaint schedule property is 1 acre 50 cents in re-survey No.97/4 of Kannavam village of Thalassery Taluk. Plaint schedule property admittedly originally belonged to the thavazhy of respondents. O.S.1098 of 1943 was filed by members of thavazhy for partition and separation of their shares. Respondents were respectively plaintiffs 3 and 5 in that suit. Father of appellant was second defendant and his elder brother was first defendant. On the contention of defendants in that suit that properties are in the possession of strangers, defendants 3 and 4 were impleaded in that suit. Under Ext.A5 preliminary decree, items 1 and 2 of plaint B schedule property were directed to be divided subject to

reservation in favour of fourth defendant under oral lease of 25th Kumbham 1105 in respect of item No.2. Subsequently on the basis of Exts.B6 and B7 plans and report submitted by the Commissioner, Ext.A4 final decree was passed on 14/12/1945. In the final decree item No.2 was divided as plots A,B and C as shown in Ext.B7.

Plot A was allotted to second defendant, plot C to plaintiffs and plot B to first defendant therein. But it was subject to the rights of Ambootty, the fourth defendant under the oral lease of 25th Kumbham 1105. Case of appellant was that while Ambootty, fourth defendant therein, was in possession of the property, appellant purchased the property after paying consideration directly to Ambootty and before he could get a sale deed executed Ambootty died and therefore appellant obtained Ext.A7 sale deed dated 23/2/1989 from the legal heirs of Ambootty and thus he is the absolute owner in possession of plaint schedule property. Contending that while appellant was admitted in the hospital for treatment, respondents trespassed into the plaint schedule property and started residing therein, a decree for recovery of possession was sought. Contending that they cut and removed 40 areca trees and thereby appellant sustained a

loss of Rs.1,000/-, said amount was claimed as damages. Appellant also sought a decree for permanent prohibitory injunction restraining respondents from trespassing into plaint schedule property.

2. Respondents filed separate written statement contending that Ambootty was never in possession of the property and lease alleged in his favour was falsely set up by father of appellant to avoid the said property from giving to the sharers and appellant himself has no independent right over the property and property belongs to the thavazhy. It was also contended that appellant is not entitled to the decree sought for. Learned Munsiff framed necessary issues. On the evidence of Pws.1 and 2, DW.1 and Exts.A1 to A9, B1 to B7, learned Munsiff dismissed the suit holding that appellant did not derive any right under Ext.A7. It was found that Ext.A7 was obtained by appellant subsequent to Ext.A6 notice sent by first respondent claiming partition and appellant is not entitled to the decree. Suit was dismissed.

3. Appellant challenged decree and judgment before Sub court, Thalassery in A.S.139 of 1992. Learned Sub Judge on re-appreciation of evidence, though did not agree with the findings of learned Munsiff that plaint

schedule property was not in possession of Ambootty, held that under Ext.A7 appellant did not derive any title and therefore appellant is not entitled to the decree sought for. Appeal was dismissed. It is challenged in second appeal. Appeal was admitted formulating following substantial questions of law.

> 1) When plaintiff claimed title and possession as an assignee from the tenant Ambootty and said tenancy right was upheld by first appellate court and defendants claimed right only on the basis that Ambootty had no tenancy right, is not the plaintiff entitled to the relief sought for especially when possession of plaintiff was admitted under Ext.A6 notice.
>
> 2) Whether first appellate court was justifed in not relying on Ext.A7, for want of consideration when legal representatives of Ambootty did not challenge the same.

4. Learned counsel appearing for appellant and respondents were heard.

5. Learned counsel appearing for appellant argued that under Exts.A4 and A5, court in O.S.1098 of 1943 had found that Ambootty was a tenant of the plaint schedule

property as per oral lease granted on 25th Kumbham 1105 and the property was divided between co-owners only subject to the tenancy right of Ambootty and respondents denied the right of appellant on the basis that Ambootty had no tenancy right and he was never in possession of property and on the basis of Exts.A4 and A5 as found by first appellate court, tenancy right of Ambootty cannot be disputed and if so, courts below should have accepted the title of appellant under Ext.A7 especially when legal heirs of Ambootty admitting the consideration, assigned the property in favour of the appellant and therefore decree and judgment passed by courts below are unsustainable. It was also argued that respondents who are third party to Ext.A7 are not entitled to challenge Ext.A7 on the ground that there was no consideration for the sale deed and when Exts.A4 and A5 establish the tenancy right of Ambootty and there was no case for respondents that the tenancy right was either surrendered or that Ambootty was evicted and possession was obtained, respondents are not entitled to contend that they have got right over the property. It was also argued that under Ext.A4 final decree, properties were divided between thavazhy members subject to the tenancy right and

in such circumstances admission in Ext.A6 should not have been ignored by courts below and Ext.A7 establishes that appellant has been in possession of the property and that possession could only be on the strength of Ext.A7 assignment granted by Ambootty and in such circumstances, appellant is entitled to the decree sought for.

6. Learned counsel appearing for respondents argued that evidence of PW1 himself establishes that he did not derive any right or title under Ext.A7. It was pointed out that when PW1 was examined in March 1992, he admitted that Ambootty died 30 years back and if so, Ambootty would have died in 1962 and according to appellant, he obtained possession only in 1970 paying consideration directly to Ambootty which cannot be believed, if he died in 1962 and therefore, it is to be found that appellant did not derive right under Ext.A7. It was also pointed out that Ext.A6 notice was sent by first respondent to appellant on 5/10/1988 and Ext.A7 was thereafter obtained on 23/2/1989 from the legal heirs of Ambootty without paying any consideration and as legal heirs have no right over the property, appellant did not derive any right or title and therefore as rightly found

by courts below, appellant is not entitled to the decree sought for. It was pointed out that though under Exts.A4 and A5 tenancy right of Ambootty was upheld, it was in 1945 at a time when there was no fixity of tenure and tenancy right could have been lost either by surrender or by abandonment or by taking forcible possession and unless there is evidence to prove that Ambootty continued in possession of the property till 1970 as claimed by appellant and handed over the possession to appellant, his claim for title can only be rejected. It was also pointed out that if the entire consideration was paid to Ambootty as claimed by appellant and Ambootty died one and half years after the payment of consideration, there was no impediment for appellant to obtain a sale deed before the death of Ambootty or at least immediately after the death of Ambootty and got the assignment deed from the legal heirs only in 1989 and it establish that it was only created to raise a claim and to defeat the rights of defendants and therefore there is no reason to interfere with decree and judgment passed by courts below.

7. True, a third party to a sale deed is not entitled to challenge the sale deed on the basis of want

of consideration. But at the same time, third party is entitled to show that sale deed was only a sham document which was created to defeat their rights. Ext.A4 shows that in the earlier suit for partition court had upheld the oral lease set up by fourth defendant in that suit and properties were divided and allotted to the sharers only subject to the right of Ambootty under the oral lease. But as pointed out by learned counsel appearing for respondents, that final decree was passed in 1945 at a time when there was no fixity of tenure. Fact that in 1945 Ambootty was in possession of the property as per an oral lease granted in his favour does not automatically lead to a conclusion that Ambootty continued in possession throughout thereafter. When appellant contended that he obtained possession from Ambootty, it is upto appellant to prove that Ambootty continued in possession of the property till the date of assignment. Ext.A7 is the title deed of appellant. Ext.A7 was executed by legal heirs of Ambootty. Recitals in Ext.A7 is to the effect that Ambootty continued in possession of the property and while so, property was orally handed over to appellant and subsequently Ambootty died and after receiving Rs.15,000/- as consideration, legal heirs

of Ambootty assigned their right in favour of appellant. What was deposed by PW1 was that he paid no consideration to legal heirs of Ambootty and obtained Ext.A7 assignment deed as consideration was paid earlier to Ambootty. On the other hand, what was contended that in 1970 property was orally assigned by Ambootty after fixing the value at Rs.15,000/-. According to PW1 after receiving Rs.5,000/- in Medam 1970 property was handed over to appellant and subsequently after nine months the balance of Rs.10,000/- was also paid to Ambootty. Therefore, it is clear from the evidence of PW1 that he did not pay any consideration to the legal heirs as shown in Ext.A7. If that be so, as rightly found by courts below, it is clear that Ext.A7 was obtained by appellant from legal heirs of Ambootty, because of findings in Exts.A4 and A5 that properties were divided subject to the tenancy right of Ambootty, and that too after getting Ext.A6 notice from first respondent. It is pertinent to note that evidence of PW1 was that Rs.10,000/- was paid to Ambootty after raising the amount by selling five jack trees from the plaint schedule property itself. If that be the case, there was no necessity for Ambootty to sell the property to appellant at all. More over, if appellant had paid the

entire consideration to Ambootty in 1970, there was no impediment for either Ambootty to execute a sale deed or for appellant to obtain sale deed from Ambootty. It is clear that Ext.A7 was created to raise a claim over the property. Under Ext.A7 appellant did not derive any right or title. Appellant is not entitled to claim title by the oral assignment of plaint schedule property as alleged when even according to appellant sale consideration is Rs.15,000/-. If that be so, appellant cannot claim any title to plaint schedule property under Ext.A7. Though there is force in the argument of learned counsel appearing for appellant that there is no case for respondent that Ambootty surrendered tenancy right and in the light of Ext.A5 tenancy right of Ambootty cannot be disputed by respondent, who are parties to Ext.A5, as rightly pointed out by learned counsel appearing for respondent, Ext.A8 series of receipts obtained for payment of tax belates the claim of appellant that plaint schedule property belongs to him. Tax receipts are not in the name of appellant alone but appellant and others. Appellant himself admitted that his brother Govindan had paid tax for about 13 years before the appellant started paying tax continuously. If property

was in the possession of Ambootty and appellant obtained property as per assignment deed in 1970, there was no necessity for his brother to pay tax. There is no evidence to prove that appellant had obtained possession. In the light of these evidence, I do not find any reason to interfere with the findings of courts below that appellant is not entitled to the decree sought for.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

==========

M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.No.776 OF 1993

24th May 2007

==========